SUPREME COURT, U. S.

FILED

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In the Supreme Court of the United States

October Term 1968

No. 1314

GARWIN CORPORATION, S'AGARO, INC., JOSEPH WINKELMAN and MILTON MIRSKY,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MIAMI REVIEW — 371-4653 — 377-3721

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Petitioners, Garwin Corporation, et al., pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on February 28, 1969.

OPINION BELOW

The opinion of the Court below (Appendix A, infra, App. 1) is not yet reported. The Supplemental Decision and Order and Amended Order and the Order Correcting Supplemental Decision and Order are reported at 169 N.L.R.B. No. 154, 67 LRRM 1296 (Appendix C, C-1, infra, App. 4-App. 16)[1]

JURISDICTION

The Judgment of the Court of Appeals was entered on February 28, 1969 (Appendix A, infra, App. 2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The question presented is whether the Board as a remedy for the unfair labor practices may properly order the employer to do either of the following:

(1) Supply the union with a list of the names and addresses of all employees and keep the list current for one year.

(2) Grant access to bulletin boards to the union for a one-year period.

(3) Permit union organizers to have unrestricted access during non-working time to plant parking lots for a period of one year.[2]

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[1]The Findings of Fact, Conclusions of Law and Order of the Board originally entered and enforced in part, denied in part, and remanded to the Board by the Court of Appeals for the District of Columbia, 374 F.2d 295 for further consideration because of defect(s) in the Remedy are reported at 153 N.L.R.B. 664.

[2]as required by the Supplemental Decision and Order and Amended Order, and specifically the Order Correcting Supplemental Decision and Order (Appendix C, infra, App. 4-App 6 and Appendix C-1, infra; see: paragraphs 2(f) (g) and (h) of Amended Order.)

STATUTE INVOLVED

The relevant provision (Section 10(c)) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.) is set forth in Appendix B (infra, App. 3).

STATEMENT OF THE CASE

The National Labor Relations Board, in June of 1965, issued a Decision and Order finding that the Petitioners, Garwin Corporation, et al., had violated Sections 8(a)(1) (3) and (5) of the National Labor Relations Act, as amended, by closing the Garwin Corporation plant in Jamaica, Long Island, and moving the operation to Miami, Florida (153 N.L.R.B. 664). The remedy, in 153 N.L.R.B. 664, among other things, required the Petitioners herein, or better, the employer, **to bargain with the Union either at the New York plant, if it returned there, or at the new Florida location, irrespective of whether the Union had a majority status.** Thereafter the Board filed a petition with the United States Court of Appeals for the District of Columbia to enforce its order. **That Court** enforced the Board's order in other respects but **rejected the remedial requirement that Respondents recognize and bargain with the Union for the employees at the Florida location, irrespective of whether the Union had majority status.**[3] The Court, in that decision, remanded the record to the Board for further consideration of **this aspect of its remedy**; all parties to the litigation then filed in this Court petitions for writ of certiorari which were denied.[4]

[3] **Local 57, I.L.G.W.U. v. N.L.R.B.**, 374 F.2d 295; see **"The Board's Remedy,"** Syllabus 9.

[4] Petitions Nos. 1251, 1327 and 1257, October Term 1966.

After remand the Board entered its Supplemental Decision and Order and Amended Order (Appendix C and C-1, App. 7-App. 16) where it recited, among other things, the following:

> "Since the **possibility exists** that the employees at the Florida location will be influenced by the Respondent's unlawful conduct, appropriate remedies are available to insure that they have an opportunity to formulate their desires with regard to representation in an atmosphere free of the fears generated by their Employers' demonstrated propensity to violate the Act. To this end we shall apply various remedies invoked by the Board to offset the effects of massive unfair labor practices in other cases where issuance of a bargaining order was denied. First, we shall order the Respondents to furnish the International Ladies' Garment Workers' Union, upon request made within 1 year, with the names and addresses of all employees at its Florida plant and to keep that list current for a 1-year period. Second, we shall require that, upon request of the International Ladies' Garment Workers' Union made within 1 month of this Supplemental Decision, the Respondents shall immediately grant said Union and its representatives reasonable access to its bulletin boards and all places where notices are customarily posted for a period of 1 year. Third, we shall order the Respondents to permit employees to have access to union organizers on plant parking lots and plant approaches during non-working hours." (emphasis added)

which not only fashioned a new and harsh remedy, but, in effect, made new findings, though not so enunciated, in order to effect the new remedy . . . .all done of course without any new or additional testimony.

The Court, in the Opinion and Judgment sought to be reviewed, granted the enforcement of the Supplemental Decision and Order. The propriety of this is the issue[5] upon which the Petitioners seek a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The Decision and Order of the District of Columbia Circuit enforcing 2(f) (Appendix p. 14) which reads as follows:

> "Upon request made within 1 year of the issuance of this Decision, immediately supply the International Ladies' Garment Workers' Union a list of the names and addresses of all employees at their Miami, Florida, plant, and keep that list current for a 1-year period."

is in direct conflict with the decision of the Second Circuit in **Textile Workers Union of America, v. N.L.R.B.** (C.A. 2, December 27, 1967) 388 F.2d 896, where the Court, speaking through Mr. Justice Joseph Smith, stated on page 905, Syllabus (11):

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[5]See paragraphs 2(f), (g) and (h) of Amended Order, and the Order Correcting Supplemental Decision and Order (Appendix p. 14)

> "(11) The final provision of the order requiring our attention is that which directs the Company to provide at the Union's request a list of the names and addresses of all of its employees in North and South Carolina. We do not think that this provision, * * * * is designed to effectuate the policies of the Act."

Likewise, the Decision and Order of the District of Columbia Circuit enforcing 2(g) (Appendix p. 14) which reads as follows:

> "Upon request, immediately grant the International Ladies' Garment Workers' Union and its representatives reasonable access, for a 1-year period, to plant bulletin boards and all places where notices to employees are customarily posted at the Miami, Florida, plant."

also appears to be in conflict with **J. P. Stevens & Co. v. N.L.R.B.** CA. 2, 380 F.2d 292 (1967) where the Second Circuit rejected the concept that reasonable access to bulletin boards in the plants be given for certain periods of time saying, in Syllabus (15) that the union had not achieved a majority status; as for the enforcement of the 2(h) provision (Appendix p. 14) which reads as follows:

> "Permit employees at the Florida plant to have unrestricted access to union organizers during non-working time on plant approaches and parking lots for a period of 1 year from the issuance date of this Decision, subject only to such reasonable and non-discriminatory regulations as

> Respondents may find it necessary to impose in the interest of plant efficiency and discipline, provided, however, that said regulations do not serve to thwart employees in the exercise of the right guaranteed them herein."[6]

the Board itself, in **J. P. Stevens & Co.**, 171 N.L.R.B. No. 163 (1968), 69 LRRM 1088, denied the union's request for access to parking lots saying that it did so for the reasons set forth in **J. P. Stevens III.** The obvious contentions between the Circuits is highlighted and enlarged by the confusion existing within the Board as indicated by its own decisions;[7] the confusion which exists as a result of the Board's so-called new approach in fashioning broader remedies is enormous; typical is the jungle jumble resulting from the **J. P. Stevens** cases . . . applicable herein and about which the Bureau of National Affairs, in its analysis of January 13, 1969 (70 Analysis 5), had this to say:

> "There have been five Stevens cases. Stevens I involved the first year of the union's organizational campaign. The NLRB handed down its decision in this case in 1966, finding that the company had engaged in 'massive' violations of the Act and had discriminatorily discharged 71 employees.

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[6]See Appendix, p. 14

[7]In its fifth J. P. Stevens decision The Board denied the Union's request for access to plant parking lots **(J. P. Stevens and Co.,** 69 LRRM 1088.)

"In view of the extensive violations, the Board decided that the case warranted a remedy going beyond the usual reinstatement, backpay and notice-posting order. It added the requirements that a copy of the notice be mailed to each employee, that a company official read the notice to employees, and that the union be given reasonable access to company bulletin boards for one year. These requirements applied to all the company's plants in the two states. (J. P. Stevens & Co., Inc. NLRB 1966, 61 LRRM 1437.)

"In its decision in the second Stevens case, the NLRB added the requirement that the company furnish the union a list of the names and addresses of all employees in its plants in the two states. (J. P. Stevens & Co., Inc., NLRB, 1967, 64 LRRM 1289.)

"The first two cases were taken to the U. S. Court of Appeals at New York. In the first case, the court went along with the notice-posting, and notice-mailing requirements of the order. But because of the 'element of humiliation' involved in the public-reading provision, the court modified the order to require that the order be read in plants in which unfair labor practices were found to have been committed and that the company be given the alternative of having a Board agent rather than a company official, read the notice. (J. P. Stevens & Co., Inc. v. NLRB, CA 2, 1967, 65 LRRM 2829.)

"The court also refused to enforce the part of the order in the first case that required that the union be given reasonable access to company bulletin boards; it stated that the Board did not establish the need for such a provision. The order, as thus modified, was denied review by the Supreme Court. (J. P. Stevens & Co., Inc. v. NLRB, U.S. Sup.Ct. 1967, 66 LRRM 2728.)

"When it reviewed Stevens II, the Second Circuit enforced the bulletin-board requirement, stressing that the requirement is limited by the word 'reasonable' before 'access.' **But it refused to enforce the names-and-addresses requirement.** (Textile Workers Union v. NLRB (J. P. Stevens & Co., Inc.), C.A. 2, 1967, 67 LRRM 2055.)

J. P. Stevens III and IV

"Stevens III involved alleged violations of the Act between April 16, 1965, and April 7, 1966; Stevens IV involved the alleged unlawful discharge of three employees in August 1966.

"In its orders in Stevens III and IV, the Board modified the public-reading requirement to provide the alternative set out in the modification made by the Second Circuit in the order in Stevens I. The names-and-addresses requirement was not included in the Stevens III order, but it was in the Stevens IV order. (J. P. Stevens & Co., Inc., NLRB 1967, 66 LRRM 1024; J. P. Stevens & Co., Inc., NLRB, 1967, 66 LRRM 1030.)

"The NLRB handed down its decision in Stevens V on June 12, 1968. The order was the same as in Stevens IV. (J. P. Stevens & Co., Inc., NLRB 1967, 69 LRRM 1088.)

SIGNIFICANCE: The problems encountered by the Board in the Stevens cases underline how difficult it is to get agreement when the Board fashions novel and broad remedies. The Board has wide discretion in drafting remedial orders that will effectuate the purposes of the Act, but the courts scrutinize closely any requirements that may be considered punitive, rather than remedial.

"In the 1966 Laney & Duke case, for example, the U. S. Court of Appeals at New Orleans deleted from an order a provision requiring the employer to read the Board's notice to all employees, calling the requirement "unnecessarily embarrassing and humiliating to management." (NLRB v. Laney & Duke Co., CA. 5, 1966, 63 LRRM 2552.) The U. S. Court of Appeals for the District of Columbia similarly refused to enforce a public-reading requirement, terming it "humiliating and degrading" to the employer. (IUE v. NLRB (Scott's, Inc.), CA DC, 1967, 66 LRRM 2081.)

"But in a case published this week, the Fifth Circuit upheld a notice-reading requirement in a case in which there was a justifiable presumption that as many as 44 or 45 of the 190 employees were illiterate. It distinguished the case from Laney & Duke, (NLRB v. Bush Hog, Inc., CA 5, 1968, 70 LRRM 2070.)

> "So there now is a conflict between the Second and Fourth and the Fifth and District of Columbia Circuits on the notice-reading requirement and between the Second and Fourth Circuits[8] on the names-and-addresses requirement in these remedial orders in what the Board refers to as 'massive' or 'flagrant' violation cases."

It is important to remark, at this point, that the Petitioners conduct in the case at bar is neither "massive" nor "flagrant" in the classical, or any other sense.[9]

As we have and shall see the direct conflict, and lack of uniformity, existing between circuits is only a part of the reason(s) why this Petition should be granted; this case is otherwise important. The remedies now being sought by the Board were hardly conceivable at the time of the enactment of Section 10(c) of the Act. The continuing future consequences of the remedies envisioned by the Board, and, indeed, those here, are troublesome and require an early and definitive ruling by this Court. In the instant case the remedies, in the light of the facts, are so erroneous as to deny due process to both the employer and its employees alike. Nor is there any question but Labor Organizations are concerned with the determinations necessary to be made.

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[8] *And now the District of Columbia Circuit.*

[9] See the Brief (and reasoning) of these Petitioners in Case #19,624 lately pending in the Court of Appeals for the District of Columbia Circuit to which this petition is directed; rather than restate by printed inclusion here, said brief, filed in October 1968 is made a part of this petition by reference as if fully set out herein; a certified copy has been forwarded to the Clerk of this Court as a part of the record.

even though it is doubtful if any bonanza will inure unto such organizations as likely envisioned should such remedies be given sustenance.[10]

Section 10(c) of the LMRA authorizes the Board to issue an order requiring the perpetrator of an unfair labor practice "to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement, with or without back pay, as will effectuate the policies of the Act."

As to the cease and desist part of the order, the courts have held that the conduct prohibited must be reasonably related to the violations found. In its early days, the Board, having found one or more unfair labor practices, customarily commanded the defendant to cease and desist from all violations. But it was brought up short by this Court in the case of **NLRB** v. **Express Publishing Co.** (1941) 312 U.S. 426, in which the Court said:

> "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger in the future is to be anticipated from the course of his conduct in the past. * * *

In cases, however, where an employer has shown persistent attempts by various methods to defeat self-organization, *unlike here*, the courts ordinarily permit a

[10]It is questionable whether the Board's Excelsior Rule, **Excelsior Underwear, Inc.**, 156 N.L.R.B. 1236, has benefited labor organizations, though increasing the work load of all those interested.

sweeping cease and desist order. Wider latitude is accorded to the Board in framing the affirmative part of its order. The test is whether the order will effectuate the policies of the Act. The Board is ordinarily made the judge of what effectuates these policies, but this Court drew this line: The Board's authority does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he has engaged in unfair labor practices, even though the Board may be of the opinion that the law's policies might be effectuated by such order. **(Consolidated Edison Co. of New York, Inc.** v. **NLRB** 1938, 59 S.Ct. 206, 305 U.S. 197.

In **N.L.R.B.** v. **Simplex Time Recorder Company,** 401 F.2d 1968 CA. 1, Syllabus 3, 4, pages 548, 549, the Court recited:

> "(3, 4) Whenever an order is not in terms restricted to the actions previously found two questions may arise: is the order too broad in substance, that is, specifying matters beyond the power of the Board to forbid; is it too broad in form, that is, not clear in what it proscribes. We did not question the substance of the prohibition in United Wire, and we do not now. Of course the fact that an employer has committed one violation of the Act does not empower the Board to enjoin any and all future violations of any character; the order must be limited to similar and therefore foreseeable misconduct. NLRB v. Express Pub. Co., 1941, 312 U.S. 426, 437, 61 S.Ct. 693, 85 L.Ed. 930.

There is nothing foreseeable in this cause that warrants enforcement of the three (3) items complained of to which this petition is addressed and so limited; there has been no suppression of any rights of the Florida employees. Without regard to the differences existing between the circuits and within the Board, these remedies, as are sought to be reviewed under the circumstances and facts of this cause, are not only arbitrary and punitive, but smack of a denial of due process, both as to the employer and its employees.

CONCLUSION

For the above stated reasons petitioners respectfully request this Court grant a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision and judgment herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Petition for Writ of Certiorari were mailed to:

ARNOLD ORMAN, ESQUIRE
General Counsel
National Labor Relations Board
Washington, D. C.

HONORABLE ERWIN N. GRISWOLD
Solicitor General of the United States
Office of the Solicitor General
Washington, D. C.

this 24th day of April, 1969.

JOSEPH A. PERKINS

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,624

September Term, 1968.

GARWIN CORPORATION, et al.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

United States Court of Appeals for the District of Columbia Circuit

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Filed Jan. 28, 1969

ORDER

On consideration of the Board's petition upon remand for an order enforcing its order issued against Garwin Corporation, et al., and of the answer filed with respect thereto by Garwin Corporation, and on consideration of the briefs filed by the parties, it is

ORDERED by the Court that the petition of the National Labor Relations Board to enforce its supplemental order be granted.

Pursuant to Rule 19 of the Federal Rules of Appellate Procedure; counsel for the Board within 14 days from the date of this order shall serve upon the respondent Garwin Corporation, et al., and file with the Clerk a proposed judgment enforcing the supplemental order of the Board. (By Feb. 11th)

Per Curiam.

(TITLE OMITTED)
Filed Feb. 28, 1969

JUDGMENT

Before: Bastian, Senior Circuit Judge; Burger and McGowan, Circuit Judges, in Chambers.

The above cause came upon to be heard upon the Board's petition upon remand for an order enforcing its order issued against Garwin Corporation, *et al.*, and of the answer filed with respect thereto by Garwin Corporation. After consideration of the briefs filed in this cause, the Court on January 28, 1969, being fully advised in the premises, issued an order granting enforcement of the Board's supplemental order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Garwin Corporation, *et al*, their officers, agents, successors, and assigns, abide and perform the directions of the Board in said order contained.

(Signature illegible)

Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

(Signature illegible)

Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

(Signature illegible)

Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

APPENDIX B

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.), is as follows:

> "Sec. 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the oipnion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action * * * * as will effectuate the policies of this Act. * * *."

APPENDIX C

(TITLE OMITTED)

Case No. 29-CA-45
(formerly 2-CA-9791)

ORDER CORRECTING SUPPLEMENTAL DECISION AND ORDER

On February 21, 1968, the National Labor Relations Board issued a Supplemental Decision and Order[1] in the above-entitled proceeding in which there were inadvertent omissions from the Notice to All Employees, attached thereto as Appendix.

IT IS HEREBY ORDERED that the Supplemental Decision and Order be, and it hereby is, corrected as follows:

1. By inserting the following paragraphs between the second and third paragraphs on page ii of the Notice to All Employees:

> WE WILL, upon request made within 1 year of the issuance of the National Labor Relations Board's Supplemental Decision, immediately supply the International Ladies' Garment Workers' Union a list of the names and addresses of all employees at our Miami, Florida, plant, and keep that list current for a 1-year period.

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[1] 169 NLRB No. 154.

WE WILL, upon request immediately grant the International Ladies' Garment Workers' Union and its representatives reasonable access, for a 1-year period, to plant bulletin boards and all places where notices to employees are customarily posted at our Miami, Florida, plant.

WE WILL permit employees at our Florida plant to have unrestricted access to union organizers during nonworking time on plant approaches and parking lots for a period of 1 year from the issuance date of the Board's Supplemental Decision, subject only to such reasonable and nondiscriminatory regulations as we may find it necessary to impose in the interest of plant efficiency and discipline, provided, however, that said regulations do not serve to thwart the employees in the exercise of the right guaranteed them.

2. By striking the last three lines of the Notice to All Employees, and substituting therefor the following:

If the employees have any questions concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office 29, 16 Court Street, 4th Floor, Brooklyn, New York 11201 (Tel. No. 596-3535); or its Regional Office 12, Room 706, Federal Office Building, 500 Zack Street, Tampa, Florida 33602 (Tel. No. 228-7711).

IT IS FURTHER ORDERED that the Supplemental Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., March 5, 1968.
By direction of the Board:

GEORGE A. LEET
Associate Executive Secretary

APPENDIX C-1

(TITLE OMITTED)

Case No. 29-CA-45

(formerly 2-CA-9791)

SUPPLEMENTAL DECISION AND ORDER

On June 28, 1965, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,[1] finding, *inter alia*, that Respondents violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, by closing their plant in New York City, discharging their employees, and moving their operations to Miami, Florida, for the purpose of depriving employees of rights guaranteed by Section 7 of the Act and to avoid bargaining with the Union. Thereafter, the Board filed a petition with the United States Court of Appeals for the District of Columbia for enforcement of its Order. The Court, while enforcing the Board's Order in all other respects, rejected the remedial requirement that Respondents recognize and bargain with the Union for employees at the Florida location, irrespective of the Union's representative status among those employees.[2] Accordingly, the Court remanded the record to the Board for "further consideration of this aspect of the remedy . . ." Thereafter, the Board petitioned the Supreme Court of the United States for writ of certiorari. On June 5, 1967, the Supreme Court denied the Board's petition.[3] Subsequently, the Board granted permission to all parties to file briefs, and the Charging Party and General Counsel did so.

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[1] 153 NLRB 664.
[2] 374 F.2d 295.
[3] 387 U.S 942.

Having reconsidered our Decision and Order in the light of the Court's rejection of the bargaining order operative at the Florida location, we find that other remedial measures are proper and necessary to effectuate statutory policies at that facility. It may be said, at the outset, that the difficulty of the task of devising effective remedies in this and other cases involving the unlawful removal of a plant to a distant site stems from the Board's not having required any employer to restore its operations, reinstate discharged employees, and bargain at the original location. While such a remedy would fully redress the unfair labor practices, the Board has, instead, sought to fashion remedial alternatives calculated to lessen the employer's opportunities for realizing any immediate or future benefit from its unlawful course of conduct if it elects to continue operating at the runaway location.

Prior to our initial decision in this case, the Board's "runaway shop" remedy merely required the employer to bargain at the new location if the statutory representative could re-establish its majority status among the work force at that location. The burden placed on the union in order to be able to meet that condition prompted the Board to reconsider the conditional bargaining order. Although fully mindful of the various conflicting interests involved herein, the Board concluded that the rights of the Florida work force "should not be preferred at the expense of a bargaining order which will dissipate and remove the consequences of a deliberate violation of statutory obligations."[4] In disagreeing, the Court acknowledged that the unconditional bargaining order would be effective to prevent Respondents from achieving "their primary illegal objective, i.e., to escape bargaining,"[5] but it did not regard

[4]153 NLRB 664, at 666.
[5]374 F.2d 295, at 302.

this as sufficient "justification for a remedy which deprives Florida workers of a basic right."[6]

Therefore, the question before us on remand is whether a remedy can be adapted to the Florida operation which will preclude Respondents from achieving the fruits of their unfair labor practices, yet do so in a manner accommodating the freedom of choice of employees at that location. In our opinion, this objective may be achieved consistent with the Court's decision, by remedies affirmatively assuring Florida employees an opportunity to exercise their organizational interests in an atmosphere free from any lingering effects of their Employers' unfair labor practice history. There can be no question that the manifest opposition to collective bargaining by an employer who in the past has resorted to wholesale discharges and plant removal to defeat employee organization will not be taken lightly by employees confronted with a present opportunity to organize collectively.

Since the possibility exists that employees at the Florida location will be influenced by the Respondents' unlawful conduct, appropriate remedies are available to insure that they have an opportunity to formulate their desires with regard to representation in an atmosphere free of the fears generated by their Employers' demonstrated propensity to violate the Act. To this end we shall apply various remedies invoked by the Board to offset the effects of massive unfair labor practices in other cases where issuance of a bargaining order was denied. First, we shall order the Respondents to furnish the International Ladies' Garment Workers' Union, upon request made within 1 year, with the names and addresses of all employees at its Florida plant and to keep that list current for a 1-year

[6] Ibid.

period.[7] Second, we shall require that, upon request of the International Ladies' Garment Workers' Union made within 1 month of this Supplemental Decision, the Respondents shall immediately grant said Union and its representatives reasonable access to its bulletin boards and all places where notices are customarily posted for a period of 1 year.[8] Third, we shall order the Respondents to permit employees to have access to union organizers on plant parking lots and plant approaches during nonworking hours.[9] Finally, in accord with our long-established practice, we shall order Respondents to bargain with International Ladies' Garment Workers' Union upon proof that a majority of employees in the appropriate unit at Miami, Florida, have designated the Union as their representative.[10]

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[7]The present case is distinguishable from *Textile Workers Union v. N.L.R.B.* (*J. P. Stevens & Co.*), F.2d (C.A. 2), December 27, 1967, where the Court denied enforcement of a name and address requirement. In *Stevens*, the employer had engaged in extensive 8(a)(1), (3), and (4) violations during an initial organization campaign. The Court reasoned that a proper remedy in such context need go no further than "dissipate the fear in the atmosphere within the Company's plants generated by its antiunion campaign." However, in the runaway shop situation statutory policies will not be effectuated merely by a "change in atmosphere" at the runaway location, particularly where, as here, the Board did not require Respondent's return to its original location and the Court has refused to enforce an immediate bargaining order. As an effective remedy in these circumstances, we believe that the names-and-addresses requirement is particularly appropriate for employee-union communications at the runaway location where as a result of the unlawful move there are few if any union adherents employed. Such a provision in our affirmative Order is also necessary to diminish the offending Employers opportunity to profit from their unlawful refusal to bargain at the original location.

[8]*H. W. Elson Bottling Company*, 155 NLRB 714, 715, enfd. with modification not here material, 379 F.2d 223 (C.A. 6).

[9]*Marlene Industries Corp.*, 166 NLRB No. 58, p. 6.

[10]See, e.g., *Mount Hope Finishing Co.*, 106 NLRB 480, 501; *Industrial Fabricating, Inc.*, 119 NLRB 162, 173; *Sidele Fashions, Inc., etc.*, 133 NLRB 547, 555-556, enfd. 305 F.2d 825 (C.A. 3).

As indicated above, we view these remedial revisions as consistent with the Court's remand and, in our opinion, they will dissipate any possible extension of the coercive effects of Respondents' unfair labor practices upon the Florida employees by opening channels of communication between the Union and employees closed by Respondents' flagrant violations of the Act, and by requiring immediate resumption of the bargaining relationship upon proof of majority. Finally, to the extent that they are designed to eradicate any organizational imbalances created by the unfair labor practices and to facilitate an opportunity for the Florida workers freely to select a bargaining representative, these remedies will diminish Respondents' opportunity to achieve the benefits of their unlawful conduct.[11]

AMENDED ORDER[12]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondents, Garwin Corporation; S'Agaro, Inc., a New York Corporation; S'Agaro, Inc., a Florida corporation; their officers, agents, successors, and assigns; and Respondents, Joseph Winkelman and Milton Mirsky, their agents, successors, and assigns, shall:

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[11]Upon a showing of cause, the Board, in the event of a change in circumstances, will reconsider the appropriateness of any segment of the Amended Order herein affected thereby.

[12]So that all of the Respondents' obligations hereunder may be contained in one instrument, we have decided to issue an Amended Order containing not only those provisions of our previous Order which we have reconsidered. but also the provisions which have already been enforced by the Court.

1. Cease and desist from:

(a) Refusing to bargain collectively, upon request, with Local 57, International Ladies' Garment Workers' Union, AFL-CIO, as the exclusive representative of all production and maintenance, packing and shipping employees, excluding office clerical employees, guards, and supervisors employed at their Jamaica Avenue, New York, plant.

(b) Discouraging membership in the aforesaid labor organization or in any other such organization of their employees by terminating the employment of, and refusing to reinstate, any of their employees or by discriminating in any other manner in regard to their hire and tenure of employment or any other term or condition of employment.

(c) In any other manner interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to form, join, or assist in the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action, which it is found will effectuate the policies of the Act:

(a) Offer to all employees who were deprived of work by the removal of Respondents' New York plant immediate and full reinstatement to their former or sub-

stantially equivalent positions (with necessary traveling and moving expenses for them and their families and their household effects), without prejudice to their seniority or other rights and privileges and in accordance with the other conditions set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(b) Make whole such employees for any loss of earnings they may have suffered as a result of the discrimination against them, as provided in the section of the Trial Examiner's Decision entitled "The Remedy."

(c) Notify the employees herein found to have been discriminated against, if presently serving in the Armed Forces of the United States, of their right to reinstatement as provided herein, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) If Respondents resume their discontinued operation in the New York City area, bargain collectively, upon request, with Local 57, International Ladies' Garment Workers' Union, AFL-CIO, as the exclusive representative of all production and maintenance, packing and shipping employees, excluding office clerical employees, guards, and supervisors employed in such operations, and

if an agreement is reached, embody such understanding in a signed agreement. If Respondents do not resume such operations, but continue at Miami, Florida, to perform the operations formerly carried on in New York, bargain, upon request, with the International Ladies' Garment Workers' Union upon proof that a majority of employees in the appropriate unit at Miami, Florida, have designated the Union as their exclusive representative.

(f) Upon request made within 1 year of the issuance of this Decision, immediately supply the International Ladies' Garment Workers' Union a list of the names and addresses of all employees at their Miami, Florida, plant, and keep that list current for a 1-year period.

(g) Upon request, immediately grant the International Ladies' Garment Workers' Union and its representatives reasonable access, for a 1-year period, to plant bulletin boards and all places where notices to employees are customarily posted at the Miami, Florida, plant.

(h) Permit employees at the Florida plant to have unrestricted access to union organizers during non-working time on plant approaches and parking lots for a period of 1 year from the issuance date of this Decision, subject only to such reasonable and non-discriminatory regulations as Respondents may find it necessary to impose in the interest of plant efficiency and discipline, provided, however, that said regulations do not serve to thwart the employees in the exercise of the right guaranteed them herein.

(i) Send to each of the employees referred to in paragraph 2(a) above, by registered or certified mail, a letter offering reinstatement and setting forth the Respondents' election as to where they will effect such reinstatement, and include in such letter a copy of the notice attached hereto marked "Appendix."[13]

(j) Post at their plant in Miami, Florida, copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondents' representative, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

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[13]In the event that this Amended Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for a "Supplemental Decision and Order," the words "a Decree of the United States Court of Appeals, Enforcing an Amended Order."

[14]However, if Respondents elect to resume in the New York area their former New York operations, such notice shall be posted at such new location.

(k) Notify the Regional Director for Region 29, in writing, within 10 days from the date of this Decision, what steps Respondents have taken to comply herewith.

Dated, Washington, D. C. Feb. 21, 1968

Frank W. McCulloch, Chairman

John H. Fanning, Member

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1314

GARWIN CORPORATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The Board's supplemental decision and order (Pet. App. 7–16, 4–6) are reported at 169 NLRB No. 154. The order of the court of appeals enforcing the Board's order (Pet. App. 1) is not officially reported. The Board's initial decision and order are reported at 153 NLRB 664, and the opinion of the court of appeals enforcing that order in part is reported at 374 F. 2d 295. The orders of this Court denying petitions for writs of certiorari to review the earlier decision of the court of appeals are reported at 387 U.S. 942.

352-482—69

JURISDICTION

The judgment of the court of appeals (Pet. App. 2) was entered on February 28, 1969. The petition for a writ of certiorari was filed on April 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer who moves his plant to evade a bargaining obligation may be required as a remedy for this unfair labor practice (1) to supply the union with which he was required to bargain with a list of names and addresses of all employees at the new plant, and to keep it current for one year; (2) to grant the union reasonable access to plant bulletin boards during that year; and (3) to permit union organizers access to plant parking lots and approaches during nonworking time, again during that year.

STATUTE INVOLVED

The relevant portion of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*) is set forth in the Appendix to the petition (Pet. App. 3).

STATEMENT

A. THE BOARD'S ORIGINAL DECISION AND ORDER

The Board found that petitioners ("the Employer") violated Section 8(a) (1), (3), and (5) of the Act by closing their plant in New York City, discharging their employees, and moving their operations to an *alter ego* in Miami, Florida for the purpose of depriving employees of rights guaranteed by Section

7 of the Act and to avoid bargaining with Local 57, International Ladies' Garment Workers' Union, AFL–CIO, the collective bargaining representative of its employees. The Board also found an independent violation of Section 8(a) (5) and (1) of the Act in the Employer's failure to consult and bargain with the Union about its decision to move its operations. The findings were based upon direct evidence of anti-union bias and of unremitting hostility toward the Union. The evidence showed that the move stemmed from the Employer's refusal to accept the bargaining relationship imposed by the Act, and that the Employer meant to keep the benefits of its escape from the Union after its move. 153 NLRB 664, 676–680; 374 F. 2d 295, 298–299 (C.A.D.C.).

To remedy these unfair labor practices, the Board ordered, *inter alia,* that the Employer bargain with the Union in Florida even though the Union had not established that it represented a majority of the employees there. 153 NLRB at 666–667. The court of appeals sustained the Board's unfair labor practice findings and enforced its order with the single exception of this bargaining requirement. It remanded this aspect of the Board's remedy to the Board for further consideration. 374 F. 2d 295, 304 (C.A.D.C.). Petitions for writs of certiorari filed by all parties to the case—the Union, the Employer, and the Board—were thereafter denied by this Court. 387 U.S. 942.

B. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

Upon reconsideration, the Board noted that the court of appeals had rejected the unconditional bar-

gaining order at the Florida location because it deprived the Florida workers of their basic right freely to select a bargaining agent. Accordingly, the Board sought to devise "a remedy * * * adapted to the Florida operation which will preclude [the Employer] from achieving the fruits of [his] unfair labor practices, yet do so in a manner accommodating the freedom of choice of employees at that location" (Pet. App. 9). It concluded that this objective could be achieved "by opening channels of communication between the Union and employees closed by [the Employer's] flagrant violations of the Act, and by requiring immediate resumption of the bargaining relationship upon proof of majority" (Pet. App. 11). The Board therefore ordered the Employer to furnish the International Ladies' Garment Workers' Union, upon request, with the names and addresses of all employees at its Florida plant and to keep that list current for one year; to grant that Union reasonable access to plant bulletin boards for one year; to permit employees at the Florida plant access to union organizers on plant parking lots and approaches, during nonworking time, for one year; and to bargain with the Union upon proof that a majority of the Florida employees have designated it as their representative (Pet. App. 9–10). In a *per curiam* order, the court of appeals summarily enforced the Board's supplemental order (Pet. App. 1–2).

ARGUMENT

The decision of the court below is clearly correct. There is neither conflict nor any other occasion for further review.

1. The remedies enforced by the court below are well within the broad remedial power conferred upon the Board by Section 10(c) of the Act, which authorizes the Board to require an employer committing unfair labor practices "to take such affirmative action * * * as will effectuate the policies of this Act." See *Fiberboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203, 215–217. Here, the Employer's unfair labor practices deprived the Union of the support it had obtained when the plant was in New York. By opening channels of communication between the Union and the employees at the Florida location, the Board's order seeks to deprive the employer of the fruits of those unfair labor practices, to assure the employees the opportunity to communicate with the Union free from employer interference, and to afford the Union an opportunity to rebuild its support at the new location. In view of the history of past unfair labor practices, the employees would be particularly likely to fear the employer's reaction to any new attempts at organization, and need a chance to obtain the information necessary to make a reasoned choice concerning representation.

2. There is no conflict between the decision of the court below and those of the Second Circuit in the *Stevens* cases. *J. P. Stevens & Co.* v. *National Labor Relations Board,* 380 F. 2d 292 (C.A. 2), certiorari denied, 389 U.S. 1005 (*Stevens I*); *Textile Workers Union* v. *National Labor Relations Board,* 388 F. 2d 896 (C.A. 2), certiorari denied, 393 U.S. 836 (*Stevens II*). In *Stevens I,* the Second Circuit denied enforcement of a provision giving the union access to the company's

bulletin boards (380 F. 2d at 305), while in *Stevens II* it enforced a bulletin board requirement but not a requirement that the company furnish a list of the employees' names and addresses (388 F. 2d at 905–906). However, the court made plain that its decisions were based, not on the Board's lack of power to impose such requirements, but on the ground that they were inappropriate in the particular circumstances there presented (see 380 F. 2d at 305; 388 F. 2d at 905–906). Since the facts of the present case are different from those in the *Stevens* cases, the holdings in those cases are not controlling here.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1969.

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